

COPY

1 Lisa T. Belenky (CA Bar No. 203225)
 2 CENTER FOR BIOLOGICAL DIVERSITY
 3 351 California Street, Suite 600
 4 San Francisco, CA 94104
 5 Telephone: (415) 436-9682 x 307
 6 Facsimile: (415) 436-9683
 7 Email: lbelenky@biologicaldiversity.org

ORIGINAL
FILED

JUL - 2 2008

E-filing

8 Michael Senatore, *application for pro hac vice pending*
 9 CENTER FOR BIOLOGICAL DIVERSITY
 10 1601 Connecticut Ave. N.W., Suite 701
 11 Washington, D.C. 20009-1056
 12 Telephone: 202-232-1216
 13 Facsimile: 202-232-1217
 14 Email: msenatore@biologicaldiversity.org

RICHARD W. WIEKING
 CLERK, U.S. DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

15 Attorneys for Plaintiffs Center for Biological Diversity and Desert Survivors

16 UNITED STATES DISTRICT COURT
 17 NORTHERN DISTRICT OF CALIFORNIA
 18 SAN FRANCISCO DIVISION

SI

19 CENTER FOR BIOLOGICAL DIVERSITY
 20 and DESERT SURVIVORS,

CV 08

3176

21 Plaintiffs,

22 vs.

23 COMPLAINT FOR DECLARATORY
 24 AND INJUNCTIVE RELIEF

25 U.S. BUREAU OF LAND MANAGEMENT,
 26 DIRK KEMPTHORNE, Secretary of the
 27 Interior, DEPARTMENT OF THE ARMY,
 28 and Brigadier General Dana J.H. Pittard in his
 official capacity as the Commanding General
 for the Department of the Army's National
 Training Center and Fort Irwin.

Defendants.

I. INTRODUCTION

1. This action is brought by Plaintiffs the Center for Biological Diversity and Desert Survivors to protect the desert tortoise, a threatened species listed under the Endangered Species Act (“ESA”), from avoidable impacts of a translocation effort undertaken by Defendant Department of the Army (“Army”). The translocation of approximately 1,700 desert tortoises was intended to protect these individual tortoises and mitigate the impacts of the expansion of the Army’s National Training Center at Fort Irwin in the California desert. As part of the mitigation for the base expansion, the Army also acquired lands previously owned by Catellus within designated critical habitat for the desert tortoise. Unfortunately, new information shows that the impacts of the translocation process itself on tortoises may be far greater than anticipated and, therefore, the impacts of the translocation on desert tortoises must be reanalyzed before any additional translocations occur.

2. New information and the experiences from the first phase of the planned two phases of the translocation reveals that the Army is moving tortoises from high quality habitat on Fort Irwin into far poorer habitat and into areas with significantly higher disease rates and potential for disease transmission than that found in the Fort Irwin desert tortoise population. Further, during the first phase of the translocation biologists found that predation on both translocated tortoises and resident or “host” tortoises was far higher than expected. Because all of these factors may lead to impacts to this imperiled species beyond those previously anticipated, the Army was required to reinitiate consultation with the U.S. Fish and Wildlife Service (“FWS” or the “Service”). Its failure to do so is arbitrary, capricious, and not in accordance with the law.

3. Further, the Army and Defendant the Bureau of Land Management (“BLM”) signed a memorandum of understanding transferring management of the mitigation lands associated with the Fort Irwin expansion to the BLM without undertaking any environmental review and without consulting with the FWS. Because the transfer of management authority is an action that “may affect” the desert tortoise and its critical habitat, consultation with FWS is required by regulations implementing the Endangered Species Act (“ESA”). *See* 50 C.F.R. 402.14.

1 Similarly, because the change in management will “significantly affect the human environment,”
2 Defendants were required to undertake environmental review pursuant to the National
3 Environmental Policy Act (“NEPA”) before transferring management authority. 42 U.S.C. §
4 4321. Therefore, the Army and BLM are in violation of the ESA, NEPA, and the Administrative
5 Procedure Act (“APA”), 5 U.S.C. § 551.

6 4. By this action, Plaintiffs request both declaratory and injunctive relief, enjoining any
7 further translocation of desert tortoises until Defendants comply with all legal requirements.

8 **II. JURISDICTION AND VENUE**

9 5. Jurisdiction over this action is conferred by 16 U.S.C. § 1540(c) (actions under the
10 Endangered Species Act (“ESA”)); 42 U.S.C. §§ 4321-4370 (the National Environmental Policy
11 Act, “NEPA”); 28 U.S.C. §§ 1331 (federal question), 1346, (United States as defendant), 2201
12 (declaratory judgment), and 2202 (injunctive relief), and 5 U.S.C. §§ 701 through 706 (the
13 Administrative Procedure Act, “APA”).

14 6. On March 17, 2006, Plaintiffs provided Defendants, by facsimile and certified mail, with
15 notice of intent to sue for violations of the ESA related to the translocation of desert tortoises
16 from Fort Irwin, California and the transfer of management authority. Defendants have not
17 responded to that notice.

18 7. Venue is properly vested in this Court pursuant to 28 U.S.C. § 1391(e) because Plaintiff
19 Desert Survivors is incorporated and based in Oakland, California and Plaintiff Center for
20 Biological Diversity maintains an office in San Francisco, California.

21 8. An actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201.
22 For all claims, Plaintiffs have exhausted all of the administrative remedies available to them.

23 **III. INTRADISTRICT ASSIGNMENT**

24 9. This action is properly assigned to the San Francisco Division of this Court because
25 Plaintiff Desert Survivors is based in Oakland and Plaintiff Center for Biological Diversity
26 maintains an office in San Francisco.

IV. PARTIES

10. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY is a national, nonprofit organization with its main office in Tucson, Arizona and a regional office in San Francisco, California. The Center's mission is to protect endangered species and wild places through science, policy, education, and environmental law. The Center has over 40,000 members, many of whom reside in California. The Center's members and staff regularly use, and will continue to use the California deserts, including the lands at issue here, for observation, research, aesthetic enjoyment, and other recreational, scientific, and educational activities. The Center's members and staff have and continue to research, study, observe, and seek protections for the desert tortoise and other listed and sensitive species in the California deserts. The Center's members and staff derive scientific, recreational, conservation, and aesthetic benefits from the desert tortoise's existence in the wild. Defendants' violations of law are contributing to the continued decline of tortoise populations and degradation of habitat used by the tortoise, and these violations harm the Center's and its members' interests in the tortoise and its habitat. The Center brings this action on behalf of itself and its adversely affected members and staff.

11. Plaintiff DESERT SURVIVORS is a California non-profit corporation centered in Oakland, California. Desert Survivors is a conservation organization with approximately 800 members focused on the protection of desert plants, wildlife and ecosystems. Desert Survivors also engages in a vigorous program of public education about desert lands and their unique character. Desert Survivors' primary goals are to protect fragile desert lands and to teach visitors to those lands about their value. Desert Survivors members place a high value on the continuing existence and essential value of desert wildlife and wilderness. Desert Survivors leads educational trips to desert lands. Desert Survivors has led more than 400 such trips to the desert in the last fourteen years, more than half of these to places that are home to the desert tortoise. Desert Survivors members value the desert as a natural ecosystem inhabited by special plants and animals. Desert Survivors will continue to lead trips, including service trips, to the desert areas of California as part of its ongoing program of monitoring desert wilderness. A major goal of these

trips is to study desert plants and animals in their natural habitats, and to monitor their condition. The desert tortoise is among the most valuable of these, because of its rarity and because of the fragility of its habitat. Desert Survivors members value desert wildlife living in its wild and natural condition, and enjoy the inspiration and educational benefits of observing wildlife in this habitat. Desert Survivors members and staff have actively sought to protect the California deserts as a place where threatened and endangered wildlife, including the desert tortoise, may flourish, where their habitat may remain unimpaired by development and excessive human interference. Desert Survivors members and directors derive scientific, recreational, conservation, and aesthetic benefits from the desert tortoise's, and other listed and sensitive species' existence in the wild. Desert Survivors believes that Defendants' actions will cause the continued decline of desert tortoise and, if these declines continue, Desert Survivors' members interests in the survival and recovery of the species and its habitat will be harmed. Desert Survivors brings this action on behalf of itself and its adversely affected members and directors.

12. Defendant UNITED STATES BUREAU OF LAND MANAGEMENT ("BLM") is a federal agency within the Department of Interior charged with the management of public lands and has legal responsibility for ensuring that its actions comply with NEPA, FLPMA, and the ESA.

13. Defendant DIRK KEMPTHORNE is the Secretary of the United States Department of the Interior and, among other things, is charged with overseeing the management of public lands by the BLM and its compliance with NEPA, FLPMA, and the ESA. The Secretary is the federal official in whom the ESA vests final responsibility for providing biological opinions and protecting species listed under the ESA. The Secretary has delegated responsibility for the administration and implementation of the ESA to the United States Fish and Wildlife Service ("FWS"). The Secretary is further charged with implementing statutes, regulations, and Executive Orders 11644 and 11989 on the lands within his control. Secretary Kempthorne is sued in his official capacity as Secretary of the Department of the Interior.

14. Defendant UNITED STATES DEPARTMENT OF THE ARMY ("Army") owns and

1 controls the lands at issue in this matter, including the National Training Center and Fort Irwin
2 and the Catellus lands acquired as mitigation for the expansion of the National Training Center
3 and Fort Irwin.

4 15. Defendant Brigadier General Dana J.H. Pittard is the commanding general for the
5 Department of the Army's National Training Center and Fort Irwin. General Pittard is sued in
6 his official capacity. (Hereinafter, Defendants the Army and Pittard are collectively referred to
7 as "Army").

8 **LEGAL BACKGROUND**

9 **The Endangered Species Act**

10 16. The ESA is a federal statute designed "to provide a means whereby the ecosystems upon
11 which endangered species and threatened species depend may be conserved, [and] to provide a
12 program for the conservation of such endangered species and threatened species...." ESA § 2(b),
13 16 U.S.C. § 1531(b).

14 17. *Listing of Species.* The ESA requires the Secretary of the Interior ("the Secretary") to
15 issue regulations listing species as endangered or threatened based on the present or threatened
16 destruction, modification, or curtailment of a species' habitat or range; overutilization for
17 commercial, recreational, scientific, or educational purposes; disease or predation; the
18 inadequacy of existing regulatory mechanisms; or other natural or manmade factors affecting the
19 species' continued existence. 16 U.S.C. § 1533(a)(1). An endangered species is one "in danger
20 of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(a). A
21 threatened species is one that will become endangered if current circumstances continue. The
22 ESA requires that the Secretary make listing determinations "solely on the basis of the best
23 scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A). Only if officially listed
24 does a species receive the full protection of the ESA. The ultimate goal of the law is to conserve
25 and recover species so that they no longer require the protections of the ESA. 16 U.S.C. §§
26 1531(b), 1532(3). The Secretary has delegated his authority under the ESA to the FWS for
27 terrestrial species including the desert tortoise.

1 18. *Critical Habitat*. Concurrently with listing a species as threatened or endangered, the
2 Secretary must also designate the species' "critical habitat." 16 U.S.C. § 1533(b)(2). "Critical
3 habitat" is the area that contains the physical or biological features essential to the
4 "conservation" of the species and which may require special protection or management
5 considerations. 16 U.S.C. 1532(5)(A). The ESA requires the Secretary to make critical habitat
6 designations and amendments "on the basis of the best scientific data available." 16 U.S.C. §
7 1533(b)(2). The ESA defines "conservation" to mean "...the use of all methods and procedures
8 which are necessary to bring any endangered species or threatened species to the point at which
9 the measures provided pursuant to this Act are no longer necessary." 16 U.S.C. §1532(3). This
10 definition of "conservation" is broader than mere survival; it also includes the recovery of
11 species. *Id.*

12 19. *Recovery Plans*. Section 4(f) of the ESA requires the Secretary to "develop and
13 implement plans . . . for the conservation and survival of endangered species and threatened
14 species." 16 U.S.C. §1533(f). Recovery plans must include a description of site-specific
15 management actions that may be necessary to achieve the conservation and survival of the
16 species; objective, measurable criteria which, when met, would result in a determination that the
17 species be removed from the list; and estimates of the time required and the cost to carry out
18 those measures needed to achieve the plan's goal and to achieve intermediate steps toward that
19 goal. 16 U.S.C. § 1533(f)(1).

20 20. *Duty to Conserve*. Federal agencies have an affirmative duty to promote the conservation
21 (*i.e.*, recovery) of threatened and endangered species. Section 2(c) of the ESA provides that it is
22 "...the policy of Congress that all Federal departments and agencies shall seek to conserve
23 endangered species and threatened species and shall utilize their authorities in furtherance of the
24 purposes of this Act." 16 U.S.C. §1531(c)(1). Section 7(a)(1) also establishes an affirmative
25 duty to conserve. 16 U.S.C. § 1536(a)(1). The duty to conserve applies equally to the Secretary
26 of Interior and other agencies.

27 21. *Duty to insure survival and recovery; duty to consult*. Pursuant to Section 7(a)(2) of the
28

1 ESA, all federal agencies must “insure that any action authorized, funded or carried out by such
2 agency . . . is not likely to jeopardize the continued existence of any endangered or threatened
3 species or result in the destruction or adverse modification of habitat of such species . . .
4 determined . . . to be critical . . .” 16 U.S.C. § 1536(a)(2). To fulfill this mandate, the acting
5 agency must prepare a biological assessment for the purpose of identifying all endangered or
6 threatened species which are likely to be affected by the action, 16 U.S.C. § 1536(c)(1), and must
7 consult with FWS whenever such actions “may affect” a listed species. 16 U.S.C. § 1536(a)(2);
8 50 C.F.R. § 402.14(a).

9 22. *Biological opinion.* Consultation under Section 7(a)(2) results in the preparation of a
10 Biological Opinion (“BiOp”) by FWS that determines if the proposed action is likely to
11 jeopardize the continued existence of a listed species or destroy or adversely modify a species’
12 critical habitat. The BiOp must include a summary of the information on which it is based and
13 must adequately detail and assess how the action affects listed species and their critical habitats.
14 16 U.S.C. § 1536(b)(3). Additionally, a BiOp that concludes that the agency action is not likely
15 to jeopardize a listed species or destroy or adversely modify its critical habitat must include an
16 Incidental Take Statement which specifies the impact of any incidental taking, provides
17 reasonable and prudent measures necessary to minimize such impacts, and sets forth terms and
18 conditions that must be followed. 16 U.S.C. § 1536(b)(4). Where an agency action may affect a
19 listed species, the absence of a valid BiOp means that the action agency has not fulfilled its duty
20 to insure through consultation that its actions will neither jeopardize a listed species nor destroy
21 or adversely modify the species’ critical habitat.

22 23. The BiOp must include an evaluation of the “cumulative effects on the listed species.”
23 50 C.F.R. § 402.14(g)(3). In addition to effects of other federal actions, “cumulative effects”
24 include “effects of future State or private activities, not involving Federal activities, that are
25 reasonably certain to occur within the action area of the Federal action subject to consultation.”
26 50 C.F.R. § 402.02.

27 24. Throughout its analysis, the BiOp must utilize the “best scientific and commercial data
28

1 available.” 16 U.S.C. § 1536(a)(2); 50 C.F.R. §402.14(d). FWS must consider all the relevant
2 factors and articulate a rational connection between the facts and its ultimate conclusion.

3 25. If an action’s impact on a species’ habitat threatens *either* the recovery or the survival of
4 a species, the BiOp must conclude that the action adversely modifies critical habitat. The ESA
5 defines critical habitat as areas which are “essential to the conservation” of listed species. 16
6 U.S.C. § 1532(5)(A). The ESA’s definition of “conservation” includes the recovery of species.
7 *See* 16 U.S.C. § 1532(3).

8 26. *Required re-consultation.* After FWS issues an incidental take statement, an agency is
9 required to reinitiate formal consultation with FWS if “new information reveals effects of the
10 action that may affect listed species or critical habitat in a manner or to an extent not previously
11 considered.” 50 C.F.R. § 402.16. Because new information shows that the expansion of Fort
12 Irwin and the associated translocation of desert tortoises to the Catellus lands “may affect” the
13 desert tortoise “to an extent not previously considered”, the Army was required to reinitiate
14 consultation with FWS. *See id.*

15 27. *Prohibition against “take.”* Section 9 of the ESA and its implementing regulations
16 prohibit any person from “taking” a threatened or endangered species. 16 U.S.C. § 1538(a)(1);
17 50 C.F.R. § 17.31. A “person” includes private parties as well as local, state, and federal
18 agencies. 16 U.S.C. § 1532(13). “Take” is defined broadly under the ESA to include harming,
19 harassing, trapping, capturing, wounding, or killing a protected species either directly or by
20 degrading its habitat sufficiently to impair essential behavior patterns. 16 U.S.C. § 1532(19).
21 The ESA not only bans the acts of parties directly causing a take, but also bans the acts of third
22 parties whose acts bring about the taking.

23 28. One exception to Section 9’s take prohibitions is relevant here. A federal agency may
24 take listed species only in accordance with an “Incidental Take Statement.” 16 U.S.C. §
25 1536(b)(4). If the terms and conditions of the Incidental Take Statement are followed, the
26 federal agency and any permittee are exempted from Section 9’s take prohibitions. 16 U.S.C. §
27 1536(o)(2).

1 29. The Army is violating Section 7(a)(2) of the ESA and its implementing regulations by
2 failing to reinitiate consultation with FWS and by failing to ensure through consultation that the
3 translocation of desert tortoises incident to the expansion of Fort Irwin does not jeopardize the
4 continued existence of this threatened species or destroy or adversely modify designated critical
5 habitat. 16 U.S.C. §§ 1536(a)(2), 1540(g); 50 C.F.R. Part 402. This constitutes a violation of the
6 ESA within the meaning of 16 U.S.C. § 1540(g).

7 30. The Army and the BLM also violated Section 7(a)(2) by failing to consult with FWS
8 before transferring management authority of the Catellus lands from the Army to the BLM.

9 **The National Environmental Policy Act**

10 31. The purpose of the National Environmental Policy Act (“NEPA”) is to “promote efforts
11 which will prevent or eliminate damage to the environment.” 42 U.S.C. § 4321. NEPA’s
12 fundamental purposes are to guarantee that: (1) agencies take a “hard look” at the environmental
13 consequences of their actions *before* these actions occur by ensuring that the agency carefully
14 considers detailed information concerning significant environmental impacts; and (2) agencies
15 make the relevant information available to the public so that it may also play a role in both the
16 decisionmaking process and the implementation of that decision. *See, e.g.*, 42 U.S.C. §
17 4332(2)(C); 40 C.F.R. § 1500.1.

18 32. NEPA and the regulations promulgated thereunder by the Council on Environmental
19 Quality (“CEQ”) require that all federal agencies, including the BLM and the Army, must
20 prepare an environmental impact statement (“EIS”) for all “major Federal actions significantly
21 affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C); *see also* 40 C.F.R. §
22 1501.4. An agency may prepare an environmental assessment (“EA”) to determine whether the
23 affects of the action require preparation of an EIS. *See* 40 C.F.R. § 1508.9.

24 33. Environmental review must provide a detailed statement of: (1) the environmental impact
25 of the proposed action; (2) any adverse environmental effects that cannot be avoided should the
26 proposed action be implemented; (3) alternatives to the proposed actions; (4) the relationship
27 between local short-term uses of the environment and the maintenance and enhancement of long-
28

1 term productivity; and (5) any irreversible and irretrievable commitments of resources that would
2 be involved in the proposed action should it be implemented. 42 U.S.C. § 4332(2)(C).

3 34. NEPA is intended to insure that agencies make informed choices when federal decisions
4 are likely to have environmental consequences. To that end, an EIS must “inform decision-
5 makers and the public of the reasonable alternatives which would avoid or minimize adverse
6 impacts or enhance the quality of the human environment.” 40 C.F.R. § 1502.1. NEPA also
7 requires federal agencies to analyze the direct, indirect, and cumulative impacts of the proposed
8 action. 40 C.F.R. §§ 1508.7, 1508.8. One of the most important aspects of NEPA is that the
9 agency is required to consider the cumulative effects of its actions, which the CEQ regulations
10 describe as:

11 the impact on the environment which results from the incremental impact of the
12 action when added to other past, present, and reasonably foreseeable future
13 actions regardless of what agency (Federal or non-Federal) or person undertakes
14 such other actions. Cumulative impacts can result from individually minor but
15 collectively significant actions taking place over a period of time.

16 40 C.F.R. § 1508.7.

17 35. When preparing an EIS or EA, an agency must ensure that high quality information is
18 available to the agency and the public before any decision is made or action is taken. Accurate
19 scientific analysis, expert agency comments, and public scrutiny are essential to implementing
20 NEPA. 40 C.F.R. § 1500.1(b). The agency is required to identify clearly all of its assumptions,
21 to explain any inconsistencies, to disclose all methodologies used, to rebut all contradictory
22 evidence, to eliminate guesswork, to make explicit reference to sources relied upon for
23 conclusions, and to record in an understandable manner the basis for those conclusions. 40
24 C.F.R. § 1502.24.

25 36. NEPA requires federal agencies to “study, develop, and describe appropriate alternatives
26 to recommended courses of action in any proposal which involves unresolved conflicts
27 concerning alternative uses of available resources.” 42 U.S.C. § 4332(2)(E). The analysis of
28 alternatives is the “heart” of the environmental review process; an EIS or EA must “rigorously

1 explore and objectively evaluate all reasonable alternatives,” in order to “provid[e] a clear basis
2 for choice among options by the decisionmaker and the public.” 40 C.F.R. § 1502.14(a).
3 Alternatives that must be considered include the following: (1) no action alternative, (2) other
4 reasonable courses of actions, and (3) mitigation measures (not in the proposed alternative). A
5 “reasonable range” of alternatives must be considered, and this must include consideration of full
6 protection of all the resources involved. The exclusion of reasonable alternatives from review
7 under NEPA renders the analysis invalid.

8 37. In addition to alternatives and impacts, NEPA requires agencies to consider mitigation
9 measures to minimize the environmental impacts of the proposed action. 40 C.F.R. § 1502.14
10 (alternatives and mitigation measures); 40 C.F.R. § 1502.16 (environmental consequences and
11 mitigation measures).

12 38. The Army and BLM violated NEPA by failing to undertake any environmental review
13 before transferring management authority for the Catellus lands from the Army to BLM.

14 **The Administrative Procedure Act**

15 39. The Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-06, provides that “[a]
16 person suffering legal wrong because of agency action, or adversely affected or aggrieved by
17 agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5
18 U.S.C. § 702.

19 40. The Army and BLM are federal agencies subject to the APA. The transfer of
20 management authority for the Catellus lands from the Army to the BLM was a final agency
21 action subject to judicial review under the APA. *See* 5 U.S.C. § 704.

22 41. The APA provides that a court shall set aside agency “findings, conclusions, and actions”
23 that are “arbitrary, capricious, or an abuse of discretion or otherwise not in accordance with law,”
24 5 U.S.C. § 706(2)(A), or are “without observance or procedure required by law.” 5 U.S.C. §
25 706(2)(D).

FACTUAL BACKGROUND

The Desert Tortoise

Basic Ecology

42. The desert tortoise is a large, herbivorous reptile occurring in the deserts of California, Arizona, Nevada, Utah, and Sonora and Sinaloa, Mexico. Ideal habitat includes areas of creosote bush scrub with high perennial plant diversity, high ephemeral plant production, annual precipitation levels of two to eight inches, and soil that will support burrows. In California, the species is most active in spring and early summer when annual plants are available for forage. Although desert tortoises are also active during the warm fall months and sporadically after summer rain storms, they spend most of the remainder of the year in burrows.

43. Desert tortoises are long-lived and do not reach sexual maturity until they are 15 to 20 years old. Once they reach sexual maturity, females produce only one to three clutches of eggs per year, and most clutches contain three to seven eggs. Although young desert tortoise survival rate estimates vary, research indicates that, at most, approximately twenty percent survive their first three years of life and only two percent of desert tortoises survive to sexual maturity.

44. While desert tortoises will eat a variety of native plants, climatic factors associated with desert environments often limit food availability. Because of their diminutive size and high energy requirements, young tortoises require access to small, protein-rich plants like wildflowers. Relative to young desert tortoises, adults require less protein and may access larger plants, thereby increasing the range of acceptable forage species available to adults.

Species Status

45. Due to a precipitous decline in desert tortoise populations throughout the species' range, FWS published an emergency rule listing the desert tortoise as endangered in 1989. 54 Fed. Reg. 32326. The Mojave Desert distinct population segment ("DPS") of the desert tortoise, including all tortoises in California as well as in parts of Arizona, Nevada and Utah, was listed as "threatened" in 1990. 55 Fed. Reg. 12178. Critical habitat was designated in 1994. 59 Fed. Reg. 5820.

1 46. Unfortunately the species' plight has only worsened since listing. Studies show that
2 tortoise populations in the Mojave Desert are facing a near total collapse. One study plot showed
3 an 84% decline between 1992 and 1999. In another study, surveys including 1,200 transects
4 over a large area of the Western Mojave Desert failed to detect desert tortoises in areas where
5 desert tortoises were previously considered to be common. On March 15, 2000, the BLM
6 released the report of a panel of tortoise experts addressing the status of the species in the West
7 Mojave in relation to the proposed expansion of Fort Irwin. The panel found that "substantially
8 fewer" tortoises occurred than were estimated to occur in 1994 and concluded that "the desert
9 tortoise in the West Mojave Recovery Unit is more appropriately characterized as 'endangered'
10 than 'threatened.'" [cite?]

11 47. In 2004, the Recovery Plan Assessment Report found that there had been significant
12 population decline in the West Mojave population. "[T]he year effect yielded a significantly
13 negative trend in adult density estimates over time . . . This analysis indicates that, taken
14 together, tortoise densities on the permanent study plots located within the Western Mojave
15 Recovery Unit are declining, as was suggested in the Recovery Plan. . . . This pattern suggests
16 that recovery actions implemented since the Plan have not resulted in the reversal of this
17 declining trend." Desert Tortoise Recovery Plan Assessment Committee Report (2004)
18 ("DTRPAC Report") at 58. The draft 2004 DTRPAC Report had also recommended that the
19 Western Mojave Recovery Unit of the tortoise should be uplisted to endangered status. Despite
20 listing and designation of critical habitat, tortoise populations have continued to decline at alarming
21 rates. *See* DTRPAC Report at 61 ("the downward trend in adult tortoise densities in the Western
22 Mojave clearly dominates the analyses").

23 48. Desert tortoises are suffering habitat loss and degradation and increased predation as a
24 result of activities such as urbanization, agricultural development, grazing, off-road vehicle use,
25 military training, recreational use, and mining, and are at risk from diseases and collisions with
26 vehicles. Artificial water sources in backcountry and wilderness areas also present a threat to
27 desert tortoises directly by entrapment and drowning and indirectly by subsidizing predators.

Fort Irwin National Training Center Expansion

49. Pursuant to the Fort Irwin Military Lands Withdrawal Act of 2001, over 110,000 acres of land formerly managed by BLM were withdrawn from the public lands, for military use. Due to the base expansion, training and heavy maneuvers will occur on both the withdrawn land in the Superior Valley and approximately 20,000 acres along the southern boundary of Fort Irwin that is currently off-limits to force-on-force training. All told, the expansion will adversely impact over 75,000 acres of desert tortoise critical habitat and is currently estimated to displace approximately 1,700 desert tortoises.

50. To mitigate adverse effects of the expansion on desert tortoises, the Army purchased almost 100,000 acres of land formerly owned by Catellus within desert tortoise critical habitat and agreed to translocate as many desert tortoises as possible from areas where training will occur as a result of the Fort Irwin expansion. In June, 2007, the Army awarded a contract worth \$6.9 million to I.T.S. Corporation to carry out the translocation of desert tortoise from the expansion areas to host sites within the Catellus lands. The Army also contracted with USGS to carry out a health and disease research program studying a small portion of the translocated tortoises.

FWS Biological Opinions Regarding Fort Irwin Expansion

51. Although the Fish and Wildlife Service initially found that the loss of critical habitat in this area would jeopardize the existence of the desert tortoise, relying on the Army's commitment to undertake various significant mitigating actions, in 2004, FWS issued the "Biological Opinion for the Proposed Addition of Maneuver Training Lands at Fort Irwin California (1-8-03-F-48)" ("2004 Fort Irwin BiOp") finding that the Fort Irwin expansion was unlikely to jeopardize the continued existence of the desert tortoise. In that opinion, FWS specified that "[i]f the Army wishes to pursue any other discretionary actions that may affect the desert tortoise or its critical habitat" beyond those actions associated with training, preparation for training, and translocation of desert tortoises from the proposed new training areas, "it must consult with the [FWS], pursuant to section 7(a)(2) of the [Endangered Species] Act."

1 52. The Army contracted with the U.S. Geological Survey ("USGS") to develop a desert
2 tortoise translocation plan, and USGS released the plan in 2005. Among strategies discussed in
3 the plan were the release of translocated tortoises into areas already occupied by desert tortoises,
4 detainment in pens of desert tortoises who are candidates for translocation but who also exhibit
5 symptoms of upper respiratory tract disease, and construction of a desert tortoise-proof fence
6 along I-15 to prevent translocated tortoises from trying to cross the freeway.

7 53. In the "Biological Opinion for Translocation of Desert Tortoises from the Southern
8 Expansion Area of Fort Irwin to Occupied Habitat, San Bernardino County, California (1-8-05-
9 F-43)" ("2006 Translocation BiOp"), the FWS considered the effects on desert tortoise and
10 desert tortoise critical habitat of this translocation plan for the 20,000 acre area along the
11 southern boundary of Fort Irwin ("Southern Expansion Area"). In that BiOp, FWS stated

12 that the proposed translocation of desert tortoises from Fort Irwin to the
13 translocation area, the installation, use, and maintenance of quarantine pens, and
14 the installation and maintenance of a fence along the southbound side of Interstate
15 15 are not likely to jeopardize the continued existence of the desert
tortoises....because the proposed action would likely kill or injure few desert
tortoises.

16 The BiOp also concluded that translocation would not result in adverse modification of desert
17 tortoise critical habitat.

18 54. Importantly, both BiOps specify that the Army must re-initiate consultation:

19 if the amount or extent of taking specified in the incidental take statement is
exceeded, or

20 if new information reveals effects of the action that may affect the desert tortoise
to an extent not previously considered.

21 55. The translocation, as planned, consists of two phases. First, translocation of tortoises
22 from the southern expansion area and second, the translocation of tortoises from the western
23 expansion area, including the Superior Valley.

24 56. On March 17, 2008 Plaintiffs provided FWS, the Army, and BLM with sixty days notice
25 of their intent to sue for violations of the ESA and NEPA. Plaintiffs alleged that the Army
26 violated the ESA by failing to re-initiate consultation with FWS in light of new information
27 revealing unanticipated effects of translocation on desert tortoises. Plaintiffs also alleged that the
28

1 Army and BLM violated the ESA and NEPA by failing to consult with FWS and by failing to
2 perform an environmental review regarding the transfer of management of the Catellus lands
3 from the Army to BLM.

4 **New Information Regarding Likely Impacts from the Translocation**

5 57. Plaintiffs are informed and believe and based thereon allege that new information shows
6 that the impacts of the translocation on the desert tortoise population is likely to be greater than
7 anticipated at the time the BiOps were issued. For example, results of studies and surveys
8 presented at the 2008 Desert Tortoise Symposium (“the Symposium”) show that lower habitat
9 quality and higher disease rates in translocation host sites may frustrate the purposes of
10 translocating tortoises from Fort Irwin to the Catellus lands.

11 58. Plaintiffs are informed and believe and based thereon allege that blood samples collected
12 from desert tortoises before translocation in both the Southern Expansion Area and translocation
13 host sites indicate far lower disease rates in the Southern Expansion Area population relative to
14 the population in the translocation host sites. Moreover, Plaintiffs are informed and believe and
15 based thereon allege that additional surveys and habitat mapping show desert tortoise habitat in
16 the translocation host sites is substantially inferior to desert tortoise habitat found in the Southern
17 Expansion Area. Plaintiffs are informed and believe and based thereon allege that research also
18 shows that desert tortoise density is far lower in host sites than in the Southern Expansion area,
19 and this suggests either that disease caused a significant die-off at host sites or that the habitat in
20 the host sites cannot support larger desert tortoise populations. Because translocation will create
21 higher tortoise densities in lower quality habitat, thus likely creating additional stress and
22 increasing susceptibility to disease, the impacts of disease transmission due to translocation
23 should be re-evaluated.

24 59. It has long been known that roads can cause a significant decrease in tortoise populations.
25 See, e.g., Boarman, W.I., and Sazaki, M, “A highway’s road-effect zone for desert tortoises
26 (*Gopherus agassizii*),” Journal of Arid Environments 65(2006) 94-101; Hoff, Karin von
27 Seckendorff, and Marlow, Ronald William, “Impacts of vehicle road traffic on desert tortoise
28

1 populations with consideration of conservation of tortoise habitat in southern Nevada,”
2 Chelonian Conservation and Biology, 2002, 4(2):449-456. Dirt roads and off road vehicle
3 (“ORV”) routes that are less frequently traveled can also cause a significant decrease in nearby
4 tortoise populations and in habitat quality. *See, e.g.*, Brooks Matthew L., and Lair, Bridget,
5 “Ecological Effects of Vehicular Routes in a Desert Ecosystem,” USGS, 2005; Bury and
6 Luckenbach, “Comparison of Desert Tortoise (*Gopherus agassizii*) Populations in an Unused
7 and Off-Road Vehicle Area in the Mojave Desert,” Chelonian Conservation and Biology, 2002,
8 4(2):457-463. In 2008, USGS also presented data at the Symposium showing a significantly
9 higher incidence of disease in desert tortoises found close to roads, thus confirming the results of
10 Berry et al. in “Attributes of desert tortoise populations at the National Training Center, Central
11 Mojave Desert, California, USA,” Journal of Arid Environments 67(2006) 165-191, which found
12 that areas of high disturbance (such as roads) correlate positively with areas with high disease
13 rates.

14 60. Given the proximity of the translocation host sites to I-15, the Fort Irwin Road (which is
15 know to have gaps in its tortoise fencing), the Mannix trail used by the Army to move heavy
16 equipment on and off the base, as well as the myriad forms of disturbance created within the host
17 sites by other roads, ORV routes, human habitation, trash, and mining, this new information
18 shows that translocating desert tortoises to the Catellus lands will place tortoises in areas of
19 higher risk for disease than previously expected. Accordingly, the likelihood of disease
20 transmission and its impacts on both the translocated tortoises and the host population must be
21 re-evaluated before the translocation moves forward.

22 61. In addition, a study published in 2007 shows significant divergence between various
23 populations within the listed DPS of the desert tortoise. *See* Murphy, Robert W., Berry, Kristin
24 H., Edwards, Taylor, and McLickie, Ann M., “A Genetic Assessment of the Recovery Units for
25 the Mojave Population of the Desert Tortoise, *Gopherus agassizii*,” Chelonian Conservation and
26 Biology 2007, 6(2): 229-251. Although scientists and FWS have in the past recognized some
27 level of distinctness between desert tortoise populations based on habitat use, behavior, and other
28

1 factors, this new information provides specific evidence of genetic divergence between these
2 populations.

3 62. Most importantly, Murphy *et al.* found that tortoise populations in the West Mojave
4 Desert are significantly distinct from other populations, including those in closest proximity,
5 such as the Eastern Mojave, the Northeastern Mojave, and Eastern Colorado populations. They
6 also found that the West Mojave population could be further distinguished into three subgroups.
7 Given the extent of this genetic distinctness, this new information shows that FWS' practice in
8 the BiOps of evaluating impacts to the desert tortoise and its critical habitat on a range-wide
9 basis from the western Mojave desert to the Colorado desert in southern California and east into
10 southern Utah should be re-examined.

11 63. Taken as a whole, there is significant new information that shows that the potential loss
12 of large numbers of tortoises in the western Mojave due to unanticipated impacts of translocation
13 may result in greater impacts on translocated tortoises than expected such that the translocation
14 efforts may not adequately mitigate impacts to the species from the Fort Irwin expansion.
15 Accordingly, in light of this new information, the Army should have re-initiated consultation
16 with the FWS before undertaking the first phase of the translocation and its failure to do so
17 violated the ESA. The Army's continuing failure to re-initiate consultation before undertaking
18 the second phase of the translocation also violates the ESA and Plaintiffs herein seek an
19 injunction prohibiting any further translocations off the base until such re-consultation is both
20 initiated and completed.

21 64. Moreover, the failure of either the Army or BLM to consult with the FWS or to complete
22 NEPA review before transfer of land management of the Catellus lands to the BLM violated both
23 the ESA and NEPA. Unless and until NEPA review is completed and ESA consultation is
24 completed, no further translocations should take place.

25 **Current Status of Desert Tortoise Translocation from Fort Irwin to Catellus Lands**

26 65. The first phase of translocation was undertaken from early to mid-April of 2008.
27 Plaintiffs are informed and believe and based thereon allege that approximately 550 tortoises
28

1 were translocated from Fort Irwin to the Catellus lands. *See* “Tortoises Airlifted to New Home
2 to Make Room for Fort Irwin Expansion”, The Press-Enterprise, April 5, 2008; “Army Moves
3 Ahead With Tortoise Transfer”, Desert Dispatch, April 4, 2008. Biologists reported extremely
4 high predation rates on both desert tortoises who had been translocated and tortoises already in
5 the host areas. In only the first three weeks after translocation began, 23 translocated and “host”
6 tortoises were killed by coyotes and several others lost limbs and suffered other wounds as a
7 result of predator attacks. *See* “Almost Two Dozen Tortoise Deaths”, The San Bernardino
8 County Sun, April 19, 2008. Plaintiffs are informed and believe and based thereon allege that
9 among the tortoises killed were included one or more female tortoises with fertile eggs. Because
10 predation rates far exceeded that predicted in the translocation plan, the Army contracted with
11 the United States Department of Agriculture Wildlife Services to implement a coyote removal
12 program. *See id.* Coyotes and the common raven are well-known predators of desert tortoise.

13 66. Plaintiffs are informed and believe and based thereon allege that the Army plans to
14 translocate an additional 100 tortoises from the Southern expansion area in the fall of 2008 and
15 that the second phase of the translocation from the Superior Valley may also begin as early as
16 September 2008.

17 **Transfer of Management Authority of the Catellus lands from the Army to BLM**

18 67. Although the 2004 Fort Irwin BiOp anticipated that land acquired by the Army to
19 mitigate the effects of the Fort Irwin expansion would ultimately be managed by BLM, it did not
20 evaluate management of these lands by BLM nor did it evaluate how such management would
21 affect the resident desert tortoises, critical habitat, or the translocated tortoises. The 2006
22 Translocation BiOp also failed to analyze management of the Catellus lands by BLM.

23 68. In 2006, the Army transferred management of the Catellus lands to BLM via a 2 page
24 document entitled “Management of Army Acquired Mitigation Lands by BLM” (011FG-2006-
25 0389 P2) (“management transfer memo”). The transfer of management authority was a final
26 agency action under the APA. 5 U.S.C. § 704. The management transfer memo states that the
27 lands will be managed by the BLM in conformance with the West Mojave Plan, a BLM resource
28

1 management plan that did not include the Catellus lands. Under the MOU, BLM would manage
2 the Catellus lands to allow multiple uses of resources—which includes use by off-road vehicles
3 and other uses that may adversely affect the desert tortoise and its critical habitat on the Catellus
4 lands.

5 69. The transfer of management authority from the Army to BLM is an action that
6 significantly affects the environment and the failure of either the Army or BLM to complete
7 NEPA review before transfer of land management authority to the BLM violated NEPA. Unless
8 and until NEPA review is completed, no further translocations should take place.

9 70. The transfer of management of these lands from the Army to BLM constitutes an action
10 that “may affect [a] listed species or critical habitat” because management of these lands by
11 BLM will affect both the resident and translocated desert tortoise populations found on these
12 lands. 50 C.F.R. § 402.14. Accordingly, ESA section 7 consultation was required. Because
13 neither BLM nor the Army consulted with FWS regarding the transfer of management, both
14 agencies violated section 7(a)(2) of the ESA. *See* 50 C.F.R. § 402.14.

15 **CLAIMS FOR RELIEF**

16 **First Claim for Relief**

17 **(Against All Defendants for Violations of NEPA)**

18 71. Each and every allegation set forth in this Complaint is incorporated herein by reference
19 as if set forth in full.

20 72. Based on the above facts and legal obligations, Plaintiffs allege that the Army and BLM
21 failed to fulfill their duties under NEPA by failing to undertake environmental review pursuant to
22 NEPA regarding significant direct, indirect, and cumulative impacts of the transfer of land
23 management authority on desert tortoises and desert tortoise critical habitat, other biological
24 resources that may be significantly impacted by the proposed transfer of ownership, and the
25 other resources in and near the action area before initiating transfer of management of the
26 Catellus lands from the Army to BLM.

27 73. The Army’s and BLM’s actions and inactions in this regard are arbitrary, capricious, and
28

1 not in accordance with procedures required by law, in violation of the APA. 5 U.S.C. §§ 701-06.

2 **Second Claim for Relief**

3 **(Against All Defendants for Violations of the ESA)**

4 74. Each and every allegation set forth in this Complaint is incorporated herein by reference
5 as if set forth in full.

6 75. The transfer of management authority from the Army to BLM constituted final agency
7 action subject to judicial review pursuant to the APA. 5 U.S.C. § 704. The Army's and BLM's
8 failure to consult with FWS regarding the transfer of management of the Catellus lands to BLM
9 was arbitrary, capricious, and unlawful because the transfer of management authority is an action
10 that "may affect listed species or critical habitat." 50 C.F.R. § 402.14. No biological opinion
11 exists that clearly identifies and analyzes the impacts of the transfer of management of the
12 translocation host areas from the Army to BLM or provides any take authority for BLM to
13 manage the resident tortoises or the translocated tortoises on these lands. Accordingly, the Army
14 and BLM were required to consult with FWS regarding the transfer of management, to ensure
15 that the transfer of management and management by the BLM does not jeopardize the desert
16 tortoise or other listed species or destroy or adversely modify critical habitat.

17 76. The Army and BLM are in violation of section 7 of the ESA and remain in violation of
18 section 7 of the ESA for failing to ensure against jeopardy and destruction or adverse
19 modification of critical habitat. These violations are subject to judicial review under 16 U.S.C. §
20 1540(g).

21 **Third Claim for Relief**

22 **(Against Defendants the Army and the Commanding General for Violations of the ESA)**

23 77. Each and every allegation set forth in this Complaint is incorporated herein by reference
24 as if set forth in full.

25 78. Because the new information outlined above reveals "effects of the action that may
26 affect listed species or critical habitat in a manner or to an extent not previously considered," the
27 Army was required to re-initiate consultation pursuant to the ESA's implementing regulations,
28

50 C.F.R. § 402.16, and the terms of the 2004 Fort Irwin BiOp and the 2006 Translocation BiOp. Accordingly, the Army's failure to re-initiate consultation violated its duties under the ESA section 7 to ensure against jeopardy and destruction or adverse modification of critical habitat.

79. The Army violated section 7 of the ESA and remains in violation of section 7 of the ESA for failing to re-initiate consultation regarding the translocation of desert tortoises from Fort Irwin in order to ensure against jeopardy and destruction or adverse modification of critical habitat. These violations are subject to judicial review under 16 U.S.C. § 1540(g).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

(1) Adjudge and declare that Defendant the Army's failure to undertake environmental review before initiating the transfer of management of the Catellus lands to BLM violates NEPA.

(2) Adjudge and declare that Defendant BLM's failure to undertake environmental review before initiating the transfer of management of the Catellus lands to BLM violates NEPA.

(3) Adjudge and declare that Defendant the Army's failure to re-initiate consultation with FWS in light of new information that reveals "effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered" violates the Endangered Species Act and its implementing regulations.

(4) Adjudge and declare that Defendant the Army's failure to initiate consultation with FWS regarding the transfer of management of the Catellus lands to BLM violates the Endangered Species Act and its implementing regulations.

(5) Adjudge and declare that Defendant BLM's failure to initiate consultation with FWS regarding management of the Catellus lands by BLM violates the Endangered Species Act and its implementing regulations.

(6) Order Defendants the Army and BLM to undertake environmental review of the transfer of management of the Catellus lands to BLM pursuant to NEPA.

(7) Order Defendant the Army to re-initiate consultation with FWS to determine whether

1 in light of the new information the translocation will have greater impacts to desert tortoises or
 2 critical habitat than anticipated in the existing biological opinions and incidental take statements.

3 (8) Order Defendants the Army and BLM to consult with FWS regarding the transfer of
 4 management of the Catellus lands to BLM.

5 (9) Pending completion of an adequate environmental review for the transfer of
 6 management of the Catellus lands from the Army to BLM, enjoin Defendants the Army and the
 7 BLM from effectuating the transfer.

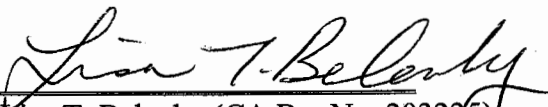
8 (10) Pending completion of adequate re-consultation with FWS regarding whether the
 9 new information outlined herein and any other new information reveals new "effects of the
 10 action that . . . affect listed species or critical habitat in a manner or to an extent not previously
 11 considered," and full compliance with Section 7(a)(2) of the ESA, enjoin the Army from
 12 undertaking any additional translocation of desert tortoises from Fort Irwin.

13 (11) Pending completion of an adequate biological opinion addressing the transfer of
 14 management of the Catellus lands from the Army to BLM, enjoin Defendants BLM and the
 15 Army from authorizing any activities that could cause additional take of tortoises on the host
 16 lands (including the use of off-road vehicles) and declare null and void and set aside the MOU
 17 transferring management of the host lands to the BLM.

18 (12) Award Plaintiffs their fees, costs, expenses and disbursements, including reasonable
 19 attorneys' fees as provided by the ESA, 16 U.S.C. § 1540(g)(4), and/or the Equal Access to
 20 Justice Act, 28 U.S.C. § 2412; and

21 (13) Grant Plaintiffs such additional and further relief as the court deems just and
 22 proper.

23 DATED: July 1, 2008


 Lisa T. Belenky (CA Bar No. 203225)
 CENTER FOR BIOLOGICAL DIVERSITY
 351 California, Suite 600
 San Francisco, CA 94104
 Telephone: (415) 436-9682 x 307
 Facsimile: (415) 436-9683
 Email: lbelenky@biologicaldiversity.org

Michael Senatore, *application for pro hac vice pending*

CENTER FOR BIOLOGICAL DIVERSITY

1601 Connecticut Ave. N.W., Suite 701

Washington, D.C. 20009-1056

Telephone: 202-232-1216

Facsimile: 202-232-1217

Email: msenatore@biologicaldiversity.org

Attorneys for Plaintiffs Center for Biological
Diversity and Desert Survivors